

M. Jacobs & Associates; and M. Jacobs & Associates, Debtor-in-Possession and Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO. Case 32-CA-13039

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

Upon a charge filed on March 5, 1993, and an amended charge filed on March 24, 1993, by the Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO (the Union), the General Counsel of the National Labor Relations Board issued a complaint on April 16, 1993, and an amended complaint on June 29, 1993, against M. Jacobs & Associates, and M. Jacobs & Associates, Debtor-in-Possession, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charges and complaints, the Respondent failed to file an answer.

On August 2, 1993, the General Counsel filed a Motion for Summary Judgment with the Board. On August 10, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint and amended complaint affirmatively noted that unless an answer was filed within 14 days of service, all the allegations therein would be considered admitted.¹ Nevertheless, the Respondent failed to file an answer.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent, a California corporation with an office and place of business in

¹ Although the General Counsel acknowledges that no further reminder or warning of the consequences of failing to file an answer was sent or given to the Respondent, we agree with the General Counsel that this does not warrant denying the Motion for Summary Judgment. See, e.g., *Superior Industries*, 289 NLRB 834, 835 fn. 13 (1988).

Watsonville, California, has been engaged in the nonretail business of soils testing and inspection. During the 12-month period preceding issuance of the amended complaint, the Respondent, in the course and conduct of its business operations, provided services valued in excess of \$50,000 directly to customers or business enterprises who themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Since on or about December 12, 1992, M. Jacobs & Associates, Debtor-in-Possession has been duly designated by the United States Bankruptcy Court as the debtor-in-possession with full authority to continue the operations of and to exercise all the powers necessary to the administration of the business of M. Jacobs & Associates.

By virtue of the event described above, M. Jacobs & Associates, Debtor-in-Possession is, and has been at all times material after December 12, 1992, a successor in bankruptcy to M. Jacobs & Associates.

By virtue of the acts and conduct described above, M. Jacobs & Associates and M. Jacobs & Associates, Debtor-in-Possession are, and have been at all times material since on or about December 12, 1992, alter egos and a single employer within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time technical employees employed by Respondent, including drill rig operators and tracers who are classified as Trainee, Technician, Engineering Technician or Senior Engineering Technician; excluding all other employees, draftsmen, office clerical employees, guards, and supervisors as defined under the Act.

At all times since at least March 1, 1990, and at all times material, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit, and since that date the Union has been recognized as such representative by the Respondent. Such recognition was embodied in a collective-bargaining agreement (Agreement), which was effective by its terms for the period March 1, 1990 through February 28, 1993.

At all times since at least March 1, 1990, the Union, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of the employees in

the unit, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Since September 25, 1992, the Respondent has failed and refused to make the health and welfare and pension trust payments mandated in sections 17.03.02 through 17.03.04 of the Agreement on behalf of eligible unit employees, to the Operating Engineers' Trust Funds.

During the period September 25, 1992 through February 28, 1993, the Respondent failed and refused, contrary to sections 02.08.00 and 02.08.01 of the Agreement, to:

(1) Remit or timely remit to the Union dues and other fees deducted from unit employees' paychecks pursuant to dues-checkoff authorizations; and/or

(2) Deduct the dues and other fees from unit employees' paychecks pursuant to checkoff authorizations.

Although the subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining, the Respondent engaged in the acts and conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with respect to such conduct and the effects of such conduct, and without the Union's consent or agreement.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing since September 25, 1992, to make the health and welfare and pension trust payments mandated by the Agreement on behalf of eligible unit employees to the Operating Engineers' Trust Funds, we shall order the Respondent to make whole its unit employees by making all payments that have not been made and that should have been made but for the Respondent's unlawful failure to make them, including any additional amounts applicable to such delinquent payments as determined in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). In

addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make such required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1979), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Having further found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing from September 25, 1992 through February 28, 1993, contrary to the Agreement, to deduct and remit union dues and other fees pursuant to the unit employees' checkoff authorizations, we shall order the Respondent to deduct and remit union dues and fees as required by the Agreement, and to reimburse the Union for its failure to do so from September 25, 1992 through February 28, 1993, with interest computed in the manner prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, M. Jacobs & Associates; and M. Jacobs & Associates, Debtor-in-Possession, Watsonville, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to make the health and welfare and pension trust payments mandated in sections 17.03.02 through 17.03.04 of the 1990-1993 Agreement to the Operating Engineers' Trust Funds on behalf of the employees in the following unit:

All full-time and regular part-time technical employees employed by Respondent, including drill rig operators and tracers who are classified as Trainee, Technician, Engineering Technician or Senior Engineering Technician; excluding all other employees, draftsmen, office clerical employees, guards, and supervisors as defined under the Act.

(b) Failing and refusing, contrary to sections 02.08.00 and 02.08.01 of the 1990-1993 Agreement, to deduct and/or remit or timely remit union dues and other fees pursuant to unit employees' dues-checkoff authorizations.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole unit employees for its failure, since September 25, 1992, to make the health and welfare and pension trust payments mandated in the 1990-1993 Agreement to the Operating Engineers' Trust

Funds, in the manner set forth in the remedy section of this decision.

(b) Deduct and remit union dues as provided for in the 1990-1993 Agreement and reimburse the Union for its failure to do so from September 25, 1992 through February 28, 1993, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Watsonville, California, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. September 10, 1993

James M. Stephens, Chairman

Dennis M. Devaney, Member

John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to make the health and welfare and pension trust payments mandated in sections 17.03.02 through 17.03.04 of the 1990-1993 Agreement to the Operating Engineers' Trust Funds on behalf of the employees in the following unit:

All full-time and regular part-time technical employees employed by us, including drill rig operators and tracers who are classified as Trainee, Technician, Engineering Technician or Senior Engineering Technician; excluding all other employees, draftsmen, office clerical employees, guards, and supervisors as defined under the Act.

WE WILL NOT fail and refuse, contrary to sections 02.08.00 and 02.08.01 of the 1990-1993 Agreement, to deduct and/or remit or timely remit Union dues and other fees pursuant to unit employees' dues-checkoff authorizations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of Act.

WE WILL make whole unit employees for our failure, since September 25, 1992, to make the health and welfare and pension trust payments mandated in the 1990-1993 Agreement to the Operating Engineers' Trust Funds.

WE WILL deduct and remit union dues as provided for in the 1990-1993 Agreement and reimburse the Union for our failure to do so from September 25, 1992 through February 28, 1993.

M. JACOBS & ASSOCIATES; AND M. JACOBS & ASSOCIATES, DEBTOR-IN-POSSESSION